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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

)

MUR 5440

)

The Media Fund

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CONCILIATION AGREEMENT

This matter was initiated by three signed, sworn, and notarized complaints.¹ The Federal Election Commission ("Commission") found probable cause to believe that The Media Fund ("TMF" or "Respondent") violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a), provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"), by failing to register as a political committee with the Commission, by failing to report contributions and expenditures, by knowingly accepting individual contributions in excess of \$5,000, and by knowingly accepting corporate and/or union contributions.

NOW, THEREFORE, the Commission and the Respondent, having duly entered into conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i), do hereby agree as follows:

- I. The Commission has jurisdiction over the Respondent and the subject matter of this proceeding.
- II. Respondent has had a reasonable opportunity to demonstrate that no action should be taken in this matter.
- III. Respondent enters voluntarily into this agreement with the Commission.
- IV. The pertinent facts in this matter are as follows:

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¹ The Commission merged allegations as to The Media Fund from MURs 5403 and 5427 into MUR 5440.

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Applicable Law

1. The Act defines a political committee as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4)(A).
2. The Act defines the term “contribution” as including “anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8)(A)(i); *see also FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (where a statement in a solicitation “leaves no doubt that the funds contributed would be used to advocate [a candidate’s election or] defeat at the polls, not simply to criticize his policies during the election year,” proceeds from that solicitation are contributions).
3. The Act defines the term “expenditure” as including “anything of value ... made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9)(A)(i).
4. Under the Commission’s regulations, a communication contains express advocacy when it uses phrases such as “vote for the President,” “re-elect your Congressman,” or “Smith for Congress,” or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, “Nixon’s the One,” “Carter ‘76,” “Reagan/Bush,” or “Mondale!” *See* 11 C.F.R. § 100.22(a); *see also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) (“*MCFL*”) (“[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this

message is marginally less direct than "Vote for Smith" does not change its essential nature."). Courts have held that "express advocacy also includes verbs that exhort one to campaign for, or contribute to, a clearly identified candidate." *FEC v. Christian Coalition*, 52 F.Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley v. Valeo*, 424 U.S. 1, 44, n.52 (1976), included the word "support," in addition to "vote for" or "elect," on its list of examples of express advocacy communication).

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5. The Commission's regulations further provide that express advocacy also includes communications containing an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and about which "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat" a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b). "Communications discussing or commenting on a candidate's character, qualifications or accomplishments are considered express advocacy under ... section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." *Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995).

6. The Supreme Court has held that "[t]o fulfill the purposes of the Act" and avoid "reach[ing] groups engaged purely in issue discussion," only organizations whose major purpose is campaign activity can be considered political committees under the Act. *See, e.g., Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262. It is well-settled that an organization can satisfy *Buckley's* "major purpose" test through sufficient spending on campaign activity. *MCFL*, 479 U.S. at 262-4; *see also Richey v. Tyson*, 120 F. Supp. 2d 1298, 1310 n.11 (S.D. Ala. 2002).

An organization's "major purpose" may also be established through public statements of purpose. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004), *rev'd in part on other grounds, on reconsideration*, 2005 WL 588222 (D.D.C. Mar. 7, 2005); *FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996).

7. The Act requires all political committees to register with the Commission and file a statement of organization within ten days of becoming a political committee, including the name, address, and type of committee; the name, address, relationship, and type of any connected organization or affiliated committee; the name, address, and position of the custodian of books and accounts of the committee; the name and address of the treasurer of the committee; and a listing of all banks, safety deposit boxes, or other depositories used by the committee. *See* 2 U.S.C. § 433.

8. Each treasurer of a political committee shall file periodic reports of the committee's receipts and disbursements with the Commission. *See* 2 U.S.C. § 434(a)(1). In the case of committees that are not authorized committees of a candidate for Federal office, these reports shall include, *inter alia*, the amount of cash on hand at the beginning of the reporting period, *see* 2 U.S.C. § 434(b)(1); the total amounts of the committee's receipts for the reporting period and for the calendar year to date, *see* 2 U.S.C. § 434(b)(2); and the total amounts of the committee's disbursements for the reporting period and the calendar year to date. *See* 2 U.S.C. § 434(b)(4).

9. The Act states that no person shall make contributions to any political committee that, in the aggregate, exceed \$5,000 in any calendar year, with an exception for political committees established and maintained by a state or national political party. *See*

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2 U.S.C. § 441a(a)(1)(C). Further, the Act states that no political committee shall knowingly accept any contribution in violation of the limitations imposed under this section. See 2 U.S.C. § 441a(f).

10. Pursuant to 2 U.S.C. § 441b(a), it is unlawful for any political committee knowingly to accept or receive, directly or indirectly, any contribution made in connection with a federal election from a corporation or a labor organization.

Factual Background

11. TMF is an unincorporated entity organized under Section 527 of the Internal Revenue Code. TMF filed its Notice of 527 Status with the Internal Revenue Service on November 5, 2003.

12. TMF has not registered as a political committee with the Commission.

13. From its inception through 2004, TMF raised \$59,414,183. While TMF received substantial sums from small individual donors, approximately 93% of its receipts during that time period—over \$55 million—came from labor organizations (or corporations) and individuals who gave in amounts that exceeded the \$5,000 limit established under the Act for contributions to political committees.

14. TMF received the majority of its funds (\$44,475,000) through a joint fundraising committee, Joint Victory Campaign 2004 (“JVC”), in which TMF and America Coming Together participated. JVC received contributions from individuals in excess of \$5,000 and it also received labor and corporate contributions. The Commission determined that approximately 85% of the funds that JVC transferred to TMF were in excess of \$5,000 and 6% of those funds were from corporate and labor sources.

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15. TMF disbursed \$57,637,115 from its inception through 2004. TMF spent approximately \$53,389,856 – or more than 92% of its reported disbursements during that time period – on 37 television advertisements, 24 radio advertisements, nine newspaper advertisements, and 20 mailers that reference President George Bush or Senator John Kerry in the context of the 2004 Presidential election. TMF broadcast or disseminated some of these communications in “battleground states,” including Florida, Missouri, Nevada, New Hampshire, Ohio, Pennsylvania, Wisconsin, and West Virginia.

16. TMF contends that its 2004 activities consisted of issue advocacy relating to the 2004 election cycle. TMF’s communications centered on pertinent social and public policy issues, such as the economy, unemployment, poverty, education, health care, prescription drugs, government special interests and fuel prices.

17. According to IRS reports and electioneering communications reported filed with the Commission, from January 1, 2005 through December 31, 2006, TMF raised \$1,020,000 and spent \$1,985,044.

TMF’s Contributions

18. The Commission concludes that the language used in fundraising solicitations sent by TMF or its joint fundraising committee, JVC, preceding the 2004 election clearly indicated that the funds received would be targeted to the election or defeat of a specific federal candidate. TMF contends that its solicitations indicated that the funds would be utilized to further the national discussion of issues relevant to the 2004 election cycle.

19. Some TMF solicitations to potential donors made it clear that the funds received would be used to sponsor advertisements depicting George Bush in “battleground

states” that would decide the upcoming presidential election. TMF touted its ongoing advertising campaigns as the basis for polls reflecting decreased public support for George Bush in these “battleground states.”

20. TMF’s former president, Harold Ickes, made direct solicitations to donors, most of which were made from joint fundraising solicitations with America Coming Together (that had a federally registered political committee). Some solicitations included slides containing messages such as “Bush can be beaten,” “The Race for 270; The fight for the White House is a state-by-state battle,” “270 Electoral Votes (Evs) Needed to Win, and “17 Key States Will Decide the 2004 Election.” The presentation also outlined TMF’s “17 state media plan” which was “[t]imed to counter Bush onslaught . . .” and indicated that TMF intended to “challenge Bush: trust, competence, economy, and other issues”

21. In addition to the general efforts of TMF to raise funds, TMF made specific solicitations to certain individuals in which it highlighted the effectiveness of its ads, as well as its overall advertising efforts, in depressing public support for Bush and increasing public support for Kerry. For example, one solicitation noted that the polls “found Bush’s job performance among swing voters fall in the states where TMF was advertising” and stated that during this “critical” time period, “TMF and [its] allies made a significant impact ensuring a Democratic message was on the airwaves at competitive levels.”

22. The Commission concludes that the fundraising efforts of JVC—premised mainly on solicitations that only identified presidential candidates—also produced “contributions” to TMF. JVC began raising funds in November 2003, and one of its solicitation documents explained “to potential donors what The Media Fund was and the need for it and,

ultimately the groundwork for asking them to support it financially.” This fundraising document, entitled “The Media Fund; Victory Campaign 2004; A Strategic Plan for Winning,” contains the following messages: “Without the aggregated resources of The Media Fund, the Democrats simply will not be competitive in this pre-convention period” and “17 states will decide who takes the oath of office for President in January 2005.”

23. In response to specific solicitations from TMF’s former president, Harold Ickes, which, the Commission concludes, indicated that the funds received would be targeted to the defeat of George Bush, certain donors gave funds to TMF through JVC as part of a fundraising “challenge” where donors agreed to donate \$20 million to TMF on the condition that a collection of labor organizations gave the same amount. For example, in a letter forwarded to potential donors, Mr. Ickes enclosed a polling report in that letter and noted that “the fact that Kerry is dead even with Bush in these [17 battleground states] and now leads with Independents by 7 points, after trailing Bush with them, speaks to the effectiveness of the combined paid media programs of TMF and AFL-CIO.”

24. The Commission concludes that all funds received in response to these solicitations constituted contributions under the Act and caused TMF to surpass the \$1,000 statutory threshold by December 2003. *See* 2 U.S.C. § 431(4)(A). TMF subsequently accepted more than \$46 million in individual contributions in excess of the \$5,000 limit and more than \$9 million in labor or corporate contributions.

25. TMF contends that it made all its fundraising communications with the good faith belief that they did not constitute solicitations for contributions under 2 U.S.C.

§431(8)(A)(i), and that FEC regulations allow joint fundraising between federal political committees and non-federal entities.

TMF's Expenditures

26. The Commission concludes that TMF expended more than \$1,000 for certain communications to the general public that expressly advocated the defeat of a clearly identified federal candidate, George Bush. These advertisements attacked the character, qualifications, and fitness for office of George Bush, or supported the character, qualifications, and fitness for office of John Kerry. TMF contends that these communications sought to discuss pertinent social and policy issues relevant to the 2004 election cycle. Examples of these communications appear below.

27. TMF spent more than \$1,000 for the following mailers that depicted or referred to George Bush or John Kerry in the context of the 2004 election:

- The "Education Mailer" addresses rising college tuition costs and states in boldtype: "John Kerry Wants Every Child To Be Able To Afford A College Education And Live The American Dream." The accompanying text addresses John Kerry's plan for the "American Dream," declaring: "We need a President who encourages pursuit of the American Dream instead of dashing these hopes. John Kerry will make college affordable for every American."
- The "Health Care Mailer" describes details of the Kerry-Edwards health care plan and announces in large-font text: "George W. Bush and Dick Cheney have NO PLAN to lower health care costs." The juxtaposition of the candidates' health care initiatives is followed with the tagline: "For Florida's Families. The Choice is Clear."
- The "Military Service Mailer" states, "These Men Could Have Served In Vietnam, But Didn't" (next to pictures of George Bush and Dick Cheney). The ad references Kerry's military service stating that it provides him a "unique perspective on decisions about sending our children into combat and caring for them when they return and when they retire." The mailer links Kerry's 30-year old military record to today's events by stating: "Vietnam was a long time ago. Some say it's not important now, while others must think it is...."

28. TMF spent more than \$1,000 on broadcast advertisements that depicted George Bush or John Kerry in the context of the 2004 election, an example of which includes the following text and imagery:

"Stand Up"

This 30-second television ad, features a screen image of Kerry accompanied by a voiceover stating,

Only a man who stands up to his government can truly lead.

John Kerry fought and bled in the Vietnam War. He fought side by side with brothers who could not get out of the draft because they didn't have a rich father like George W. Bush.

The ad concludes with the statement: "You better wake up before you get taken out."

29. The Commission concludes that all of these communications comment on George Bush's character, qualifications, and fitness for office, explicitly link those charges to his status as a candidate for President, and have no other reasonable meaning than to encourage actions to defeat George Bush. Therefore, because the Commission concludes that the communications are "unmistakable, unambiguous, and suggestive of only one meaning" and because reasonable minds cannot differ that the communications urge Bush's defeat, they are express advocacy as defined at 11 C.F.R. § 100.22(b).

30. Furthermore, the Commission concludes that one of these communications, the "Education Mailer" also contains express advocacy under 11 C.F.R. § 100.22(a) because it refers to the "need" for a particular kind of President, followed by identification of John Kerry as that type of candidate.

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31. As a result of these communications, the Commission concludes that TMF made expenditures in excess of the \$1,000 statutory threshold for political committee status. See 2 U.S.C. § 431(4)(A).

32. TMF contends that the communications described above centered upon important policy issues. TMF further contends that it made all of its communications with the good faith belief that the communications did not contain express advocacy or constitute expenditures under 2 U.S.C. §431(9)(A)(i), and that its expenditures were properly and in good faith publicly disclosed under I.R.C. §527. TMF contends that it predicated this belief on their understanding, informed by legal advice, of the legal definition and scope of "express advocacy" under Supreme Court and other appellate case law and the Commission's regulatory and enforcement policies and practices regarding "express advocacy."

33. Furthermore, TMF contends that to the extent that its communications referred to a clearly identified federal candidate, it used only individual funds and filed electioneering reports with the Commission.

TMF's Major Purpose

34. The Commission concludes that TMF's statements and activities demonstrate that its major purpose was to elect John Kerry and defeat George Bush. From its inception, TMF presented itself to donors as a destination for "soft money" that the DNC no longer could accept, but which TMF could use to support the Democratic presidential nominee. TMF proclaimed that, "Under the new law, the DNC ... will not be able to raise enough money to pay for sufficient media in 2004 to make an impact. Without the aggregated resources of The Media Fund, the Democrats simply will not be competitive in this pre-convention period."

35. The Commission concludes that the focus of TMF was on running advertisements in the "17 key states" considered to be battleground states in the 2004 Presidential election. TMF noted that these "17 states will decide who takes the oath of office for President in January 2005." It argued that

The key to winning enough of these 17 battleground states will be the turnout of Democratic base constituencies ... and, very importantly, the ability to identify the key swing votes who are open to persuasion to vote Democratic. Figuring out the effective issue messages that will move these swing votes [sic] and delivering those messages between March and late August, before the race is defined by the Bush campaign, is critical to the outcome of the 2004 race.

TMF's fundraising presentations explicitly cited the goal of reaching "270 electoral votes" for the Democratic Presidential nominee.

36. The Commission concludes that TMF's communications to the public further establish its major purpose of federal campaign activity—specifically the defeat of George Bush. The vast majority of TMF's advertisements—34 out of 36 television advertisements, 20 out of 24 radio advertisements, and 26 out of 29 print advertisements—mention either George Bush or John Kerry. Moreover, not one of TMF's advertisements mentions any candidates other than the presidential and vice-presidential contenders in the 2004 general election. TMF's self-proclaimed goal in producing and running these advertisements was to decrease public support for Bush and to increase public support for Kerry.

37. TMF contends that it operated under a good faith belief that it had not triggered political committee status. The Commission has never alleged that TMF acted in knowing defiance of the law, or with the conscious recognition that its actions were prohibited by law, made no findings or conclusions that there were knowing and willful violations of the law in

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connection with this matter and, thus, does not challenge TMF's assertion of their good faith reliance on their understanding of the law.

V. Solely for the purpose of settling this matter and avoiding litigation costs, without admitting or denying each specific basis for the Commission's findings above, Respondent agrees not to contest the Commission's conclusion that Respondent violated the Act in the following ways:

1. TMF violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee.
2. TMF violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of \$5,000 and 2 U.S.C. § 441b(a) by knowingly accepting labor or corporate contributions.

VI. Respondent will cease and desist from violating 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee. Respondents will cease and desist from violating 2 U.S.C. §§ 441a(f) and 441b(a) by accepting contributions in excess of the limits as set forth in the Act or from prohibited sources. Respondent will provide an executed copy of this agreement to each of its current and former officers, principals, agents, representatives, successors, and assigns, and certify in writing to the Commission that it has complied with this requirement, including identifying each individual that Respondent has provided with an executed copy of the Agreement.

VII. Respondent will pay a civil penalty to the Federal Election Commission in the amount of Five Hundred and Eighty Thousand Dollars (\$580,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

VIII. Respondent will register with the Commission as a political committee. TMF will submit to the FEC copies of its Form 8872 reports previously filed with the Internal Revenue Service for activities from January 1, 2004 through the present, supplemented with the additional information that Federal political committees are required to include on page 2 of the Summary Page of Receipts and Disbursements of FEC Form 3X.

IX. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia..

X. This agreement resolves all matters that relate to the activities of The Media Fund arising from MUR 5440 and, except as provided in Section IX of the agreement, no further inquiry or action will be taken by the FEC regarding the matters described herein.


XI. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

XII. Respondent shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

XIII. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.


FOR THE COMMISSION:

Thomasenia P. Duncan
General Counsel

BY: 
Ann Marie Terzaken
Acting Associate General Counsel
for Enforcement

11/15/07
Date

FOR THE RESPONDENT:


Lyn Utrecht
Counsel

10/29/07
Date